

Letter of Findings: 01-20130403P
Penalty
For the Year 2009, 2010, and 2011

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ISSUE

I. Tax Administration – Penalty.

Authority: IC § 6-3-4-13; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the penalty assessment.

STATEMENT OF FACTS

Taxpayer is an S Corporation doing business in Indiana. Taxpayer has two shareholders and both reside outside of Indiana (the "nonresident shareholders"). The Indiana Department of Revenue ("Department") conducted an investigation which determined that Taxpayer failed to file composite returns and failed to withhold any tax from the nonresident shareholders for tax years 2009, 2010, and 2011. As a result, the Department assessed Taxpayer a negligence penalty.

Taxpayer protested the penalty. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Tax Administration – Penalty.

DISCUSSION

The Department assessed Taxpayer penalty because Taxpayer failed to file composite returns and failed to withhold any tax from the nonresident shareholders for tax years 2009, 2010, and 2011.

IC § 6-3-4-13(a) provides:

Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8\(2\)](#) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and
- (2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

IC § 6-8.1-10-2.1(h) provides:

A:

- (1) corporation which otherwise qualifies under [IC 6-3-2-2.8\(2\)](#);
- (2) partnership; or
- (3) trust;

that fails to withhold and pay any amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#) shall pay a penalty equal to twenty percent (20 [percent]) of the amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#). This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be

considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer is required to withhold from its nonresident shareholders but it did not do so.

Taxpayer simply protested the penalty without providing any explanation. Given the totality of the circumstances, in the absence of supporting documentation, the Department is not able to agree that Taxpayer has demonstrated a reasonable cause for a waiver. Thus, Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest on the imposition of penalty is respectfully denied.

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